United States Postal Service and Joseph Eiche. Cases 22-CA-10738 (P) and 22-CA-11280 (P)

## March 10, 1983

## **DECISION AND ORDER**

# By Members Jenkins, Zimmerman, and Hunter

On September 30, 1982, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

## **ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, United States Postal Service, Jersey City, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

<sup>1</sup> The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

#### **DECISION**

#### STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: On March 27, 1981, Joseph Eiche, filed the unfair labor practice charge in Case 22-CA-10738 (P). All dates hereinafter are for 1981 unless specified otherwise. On May 22, a complaint issued in that case alleging that the United States Postal Service (hereinafter called Respondent), violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended (herein called the Act). Respondent filed an answer which denied certain of the

factual allegations in that complaint and also the conclusionary assertions therein that it violated the stated sections of the Act. On November 12, Eiche filed the charge in Case 22-CA-11280 (P) which was consolidated with Case 22-CA-10738 (P) on December 30. An amended complaint also issued that day. I heard the consolidated cases on various days in January, February, April, and May 1982.

The issues to be resolved turn on credibility for the most part. They are:

- (1) Whether Respondent, by acting Supervisor Cooke, threatened employees with discharge or discriminated against Charging Party Eiche, because of his testimony in Case 22-CA-10489 (P) or his union activities.
- (2) Whether Respondent, also by Cooke, threatened employees that their overtime work assignments would be eliminated if they filed or processed grievances with the New York Metro Area Local of the American Postal Workers Union, AFL-CIO (herein called the Union).
- (3) Whether Respondent, by its acting Supervisor Meadows, threatened the charging party, Joseph Eiche, with bodily harm to discourage him from performing his duties as a union steward.
- (4) Whether Respondent eliminated overtime for certain employees because of Eiche's union activities.

Upon the entire record in this case, 2 including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following:

#### FINDINGS OF FACT

#### I. JURISDICTION AND THE UNION'S STATUS

As established in the pleadings, as amended, the Board has jurisdiction over Respondent as provided for in the Postal Reorganization Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

## A. Background and Eiche's Activities as Steward

Respondent maintains a facility located in Jersey City, New Jersey, known as the New York International Bulk Mail Center where it has approximately 4,000 employees. About 500 of them work in the maintenance department and they are represented by the Union.

The Charging Party, Joseph Eiche, is employed at Respondent's New York International Bulk Center as a general mechanic. He entered Respondent's employ in August 1973, and has been a shop steward for the Union since September 1980.

On December 9, 1980, one of Eiche's coworkers, Marvin Hodges, filed an unfair labor practice charge

<sup>&</sup>lt;sup>2</sup> In adopting the Administrative Law Judge's Decision, Member Hunter notes that no party at the hearing or thereafter in exceptions urged deferral to the grievance/arbitration procedures of the relevant collective-bargaining agreement. Member Hunter further notes that his affirmance of the Administrative Law Judge's decision in the circumstances herein does not imply acceptance or reliance on the Administrative Law Judge's discussion of the majority holding in U.S. Postal Service, 227 NLRB 1826 (1977).

<sup>&</sup>lt;sup>1</sup> In its answer, Respondent asserted as an affirmative defense that the complaint should be dismissed as the alleged violations can best be resolved via the arbitration procedures of the applicable collective-bargaining agreement. In view of the nature of the alleged violations and as it is evident that no recourse to those procedures has been had, I find no merit to that affirmative defense. See U.S. Postal Service, 227 NLRB 1826 (1977).

<sup>&</sup>lt;sup>2</sup> The General Counsel's unopposed motion to correct various parts of the transcript is granted.

with the Regional Office of the National Labor Relations Board (herein called the Board). On December 14, 1980, Eiche and Hodges met with Gregory Cooke, an acting supervisor at the Jersey City facility, who was in charge of a maintenance crew which included Eiche and Hodges. Eiche showed Cooke evidence submitted by Hodges as to various disciplinary steps taken against him in the preceding year. Eiche sought to have Hodges' slate made clean. Cooke told Eiche he could not resolve that grievance. Eiche told him that he would then "take all the evidence . . . to the Board." On December 23, 1980, Eiche pressed this same matter with a labor relations specialist of Respondent and when his effort proved unproductive, he informed the specialist that he would bring the evidence to the Board's attention.

Eiche cooperated in the investigation of the charge filed by Hodges. Respondent was aware of that fact as Eiche was given time off by Cooke to comply with a letter he received from the Board's Regional Office to go there on January 2.

The unfair labor practice charge filed by Hodges alleges that he had been unlawfully prevented by Respondent from meeting with Eiche to pursue his grievances. A complaint issued in that case. Cooke's name appeared in that complaint as an agent of Respondent. That case was settled before hearing.

It is undisputed that Hodges did not receive any further discipline from Respondent after he filed that charge. In fact, Hodges testified for Respondent against Eiche in the instant case, as discussed below.

It is also undisputed that Eiche had never been disciplined by Respondent from the time he began working for Respondent in 1973 until after he assisted Hodges.

## B. The Conflicting Testimony

The General Counsel contends that, almost immediately after Respondent was charged in the prior case with interfering with the rights of employees to meet with Eiche as their shop steward, Eiche became the object of a vendetta by his supervisor, Cooke. In that regard, the General Counsel has asserted that Eiche's disciplinary record, unblemished for his first 7-1/2 years, was marred by numerous disciplinary notices issued him within several months of the filing of the prior unfair labor practice case. The General Counsel argues that Respondent's discipline of Eiche was all discriminatorily motivated. Respondent urges that the evidence establishes that the discipline it meted out to Eiche was based solely on nondiscriminatory considerations. The determination of that issue rests in good part on resolutions as to the credibility of witnesses at the hearing before me.

#### 1. Alleged threat to fire Eiche

Eiche testified that soon after he had gone to the Board with respect to the charge filed by Hodges, he discussed the matter with Respondent's supervisor, Gregory Cooke. As noted earlier, Cooke was named in the complaint which issued on January 21 in Case 22-CA-10489 (P). According to Eiche, Cooke told him in the course of a conversation in early 1981 that he, Cooke, was going to fire him because he helped Hodges file that

charge. Eiche testified that he asked Cooke what army he had to help him and that Cooke responded that he was going to do it all by himself. Eiche testified that that discussion took place at Cooke's desk and that there was no one else near them then. Cooke testified for Respondent and denied that he threatened Eiche with discharge; I infer from this that he denies having had the discussion with Eiche at his desk, as Eiche recounted. The discussion of the credibility issue raised by their conflicting accounts is set out in a separate section below, where related issues are also discussed.

## 2. Eiche's first disciplinary action

On February 5, Eiche received the very first disciplinary notice issued him since he began working for Respondent in 1973. That notice related that Eiche, during working time on February 4, had persisted in reading papers related to his duties as union steward without having obtained authorization to do so and that when Supervisor Cooke informed him on February 4, that a "recurrence of that infraction will result in further corrective action," Eiche responded by telling Cooke "to go ahead and write me the fuck up; I don't care." Eiche testified that he did not, on February 4, read any papers pertaining to union matters and he denied that he ever told Cooke to "write him the fuck up." Eiche filed a grievance and therein contended that Cooke had "fabricated the whole incident." Eiche testified that he withdrew that grievance as he elected to pursue the matter via the instant case, rather than via the grievance procedures in the applicable collective-bargaining agreement. Respondent called Cooke to testify as to the foregoing matter; his account tracks the report contained in the February 5 warning letter. In addition, Cooke testified that he regularly made entries in a memorandum notebook he uses in performing his job and that he made an entry therein on February 4, respecting the incident that day that gave rise to the issuance to Eiche of the February 5 disciplinary notice. According to Cooke, the entries in the notebook were made in chronological order. That notebook was received in evidence. The first entry therein is dated August 21, 1980. There is then an entry for September 4 followed by one for September 19 and then two others dated September 23. The following several pages in that book have notes and dates which do not follow a consistent pattern. Next in the book, it appears a page had been torn out. Entries then resume but not in regular chronological order. Thus, there appear three entries for October 28, followed by two for October 10, then one for October 20, two for October 22, one for October 27, one for October 29 and then an entry dated November 18, 1980. The November 18 entry indicates that Cooke spoke to Eiche about his conducting union business on working time without written authorization. No testimony was offered to explain why no entries had been made in the notebook by Cooke between October 27 and that one on November 18. The next entry appears on the reverse side of that page and is dated January 15, 1981, and it also notes that Eiche had been working on union business without authorization. The next entry is dated February 4, 1981, and it reads,

"0950 caught him again" "go ahead write me the fuckup." On the following page, the entries are dated November 18, 1980. The last number in that entry, the "0," was written over with the letter "l." Following that were entries for October 22, November 15, and February 4, each with the word "Same" alongside. The next entry is dated March 6, 1981, and quotes abusive language by Eiche. The next page is blank. The next entry is dated February 13, 1981, followed by others dated March 10, 1981. Numerous entries were made from March 16 to April 28, mostly stating that Eiche had engaged in various forms of misconduct. The last entries in the notebook are dated June 15, July 7, and August 19 and 20, 1981. My examination of the notebook reveals that Cooke began in late August 1980 to make regular work entries in it, that he stopped doing that for a period in mid-September 1980, that he used it in a disjointed manner for the rest of 1980, and that for 1981 he noted principally incidents involving Eiche. Further, the entries at the beginning appear to have been made in chronological order on a fairly regular basis but not those after October 1980.

# 3. Alleged threats to discharge Eiche and to eliminate overtime work assignments

Eiche testified that on March 5 he was at Cooke's desk discussing an earlier grievance meeting pertaining to the February 5 warning letter Eiche had received, as related above. According to Eiche, he told Cooke that Cooke had no case whatsoever against him and that there was no evidence that he, Eiche, had cursed Cooke. Eiche testified that he asked Cooke to withdraw the warning letter so that they could resolve any differences between them. Eiche testified further that, instead, Cooke responded that he was going to continue to give Eiche "disciplinary actions until it resulted in [Eiche's] removal from the Postal Service." Cooke denies having had any such discussion with Eiche.

An incident which relates to a relevant credibility issue occurred on March 6. Eiche testified as follows as to the events that day. On the morning of March 6, Supervisor Cooke talked to him and other members of Cooke's maintenance crew respecting overtime assignments for the following weekend. Eight of the ten members of that crew were then scheduled to work such overtime. About an hour later, Eiche asked Cooke for a pass to speak to "labor relations." Cooke asked him why he was going there and Eiche answered that he wanted to speak with labor relations about Cooke's failure to schedule step-one grievance meetings with him. Cooke gave him the pass and Eiche then saw Helen Dolby, apparently one of Respondent's labor relations specialists. Eiche returned to his work area. It appears that he then was able to take up two step-one grievances with Cooke and that one of them involved a threat by another supervisor to cut overtime out if certain grievances were pursued. Cooke said that was a good idea and that he would do the same. That meeting ended. Eiche observed that afterwards Cooke talked to the crew and "he went right on down the line" to inform them that the overtime to which they were assigned that morning was postponed. The overtime assignments were then canceled.

The General Counsel called two mechanics to testify as to that event. The first, Inocencio Delgado, testified as follows. Cooke asked him that day if he would work weekend overtime and that, when he said he would, Cooke made a notation in a pad he was carrying. Later that day, Cooke told him that overtime was canceled. He asked Cooke to tell him why and was told simply to ask his shop steward. A week later Delgado asked Cooke why he was not being assigned overtime; Cooke told him he could thank his shop steward. Delgado did not receive another weekend assignment for the next 7 months. The second mechanic, Matthew Coppola, testified along the same line.

Cooke testified during Respondent's case as follows regarding the events on March 6. Eiche discussed with him a "class grievance" which "was sort of pertaining to overtime" in other work areas; the grievance was based on a claim that, in those areas, overtime was being withheld because grievances were being filed. After investigating it, Cooke informed Eiche that the grievance was denied. Cooke was asked if he had ever told Eiche that overtime should be curtailed because of the filing of grievances and he answered that he never did. Cooke stated that on March 6 he asked his crew to work overtime on the following day and that that overtime work was canceled after he spoke with the superintendent of building equipment maintenance. Cooke testified that the superintendent asked him how his crew was doing on the overhaul work and that he responded that they were far ahead. Cooke testified that the superintendent then told him not to schedule overtime.

Respondent called four mechanics to testify respecting the March 6 overtime discussions. The first, Marvin Hodges, 3 testified that Cooke told each member of his crew on March 6 that there would be no more overtime because "there was nothing to justify" overtime. Hodges responded in the negative when asked if Cooke had said that the Union was responsible for the cancellation of overtime. The second mechanic, William Smith, testified essentially the same as Hodges. The third mechanic, Antonio Diaz, testified that no reason was given for the cancellation of overtime and that he did not hear anyone say that cancellation was the fault of the Union. The fourth mechanic, Ernest Boyd, testified that he did not know why overtime was canceled in March.

# 4. Alleged threat on March 9 by Acting Supervisor Meadows

Eiche testified that on March 9 he handled a grievance with then acting supervisor, Joseph Meadows, respecting his refusal to grant an employee an extra 15 minutes after lunch to enable him to pick up his daughter. Eiche testified that, in investigating that grievance, he learned that Supervisor Meadows had once given his entire crew an extra long lunchbreak to enable them to attend a retirement party. Eiche testified he asked Meadows how he could justify refusing an employee's request for an

<sup>&</sup>lt;sup>3</sup> He is the same person who filed the charge in Case 22-CA-10489 (P), discussed above, and upon which a complaint issued in January 1981, alleging that Respondent had unlawfully prevented employees from seeing Eiche as their shop steward.

extra 15 minutes to pick up his daughter in light of his once having given extra time to the whole crew. According to Eiche, Meadows became incensed and threatened to punch him. Eiche related further that, on the following day, Meadows and Cooke falsely accused him of having made racial slurs.

Meadows testified for Respondent as follows. He conducted a step-one grievance meeting with Eiche on March 9 pertaining to an employee's lunch hour. When he told Eiche that the grievance was denied, Eiche became abusive to him and called him a "porch monkey baboon . . . [who has] no fucking sense." Meadows responded by telling Eiche to report back to work. Meadows did not threaten Eiche with physical harm. Meadows made an immediate report of the March 9 incident. Meadows did not, in his direct testimony, refer to the testimony of Eiche that he, Meadows, had on one occasion let his crew have a long lunch hour for a retirement party. On cross-examination, Meadows testified that there had been an occasion when some employees were allowed to take an early lunch because a coworker was retiring. He also acknowledged then that Eiche had in some manner brought that matter to his attention but that Meadows did not get upset over it.

#### 5. Denial of Eiche's request for annual leave

Eiche testified that he did not work on March 11, 12, or 13 because of his wife's serious illness then. He testified also that he spoke with Cooke on March 16 about the matter and was told that his leave slip for those dates would be approved. Eiche's account is that his wife has had recurrences of her illness since 1979 and that, prior to March, his leave requests to take care of his wife had been approved routinely. On March 17, he was asked by Cooke to furnish substantiation of his wife's illness. This was the first time such a request was made, according to Eiche. He furnished Cooke with data thereon. On March 18, his request for annual leave for March 11, 12, and 13 was denied by Cooke on the ground he had not provided the requested substantiation. On March 23, he obtained a report bearing on his wife's illness and gave it to Cooke who told him that it was not acceptable as it was handed in too late. Eiche testified he later received doctor's bills covering treatment given his wife on March 11, 12, and 13; it appears he never showed them to Cooke.

Eiche was recorded as AWOL on March 11, 12, and 13. The General Counsel offered testimony that, in mid-February 1981, an employee of Respondent was recorded as AWOL. Eiche was not successful in persuading the supervisor of that employee to take the employee's word that he was out due to illness. However, 2 weeks latter, that employee furnished a doctor's note and he was recorded as having been on sick leave; the AWOL notice was rescinded for that employee.

The complaint in this case alleges that Eiche was also discriminatorily denied leave for a half day on March 18. He testified that on March 17 he filled out a slip to take a half day's leave on the following afternoon in order to meet with his wife's doctor and a caseworker respecting her illness and that he gave the slip to Cooke. He testified he told Cooke that he would also get the necessary documentation to support his earlier leave request for

March 11, 12, and 13. Eiche testified that Cooke told him that he, Cooke, would fill out the leave slip on the following day and that Eiche can attend the meeting. Instead, according to Eiche, he was given a 7-day notice of suspension. On March 18, he was told by Cooke that his request for a half day leave was denied and was advised that he was being given an AWOL for March 11, 12, and 13.

Cooke testified for Respondent that on March 18 Eiche said to him about 3:45 p.m. that he would like a half day's leave for the following afternoon and he, Cooke, responded, "Okay, we'll fill out the stuff in the morning on our way downstairs." He further testified that, on the following day, Eiche came to him at lunchtime and asked what had happened to his half-day leave slip. He testified that he told Eiche he had forgotten all about it and asked if he still wanted to go. According to Cooke, Eiche said that he did not as it was too late.

There is an allegation in the complaint that another request by Eiche for annual leave was discriminately denied. Eiche testified as follows as to that incident. He was granted annual leave for July 6 because the transmission in his car broke down and needed repair. He borrowed a car to get to and from work for the rest of that week except that for several hours on July 8 the borrowed car was not made available to him. As a result, he reported for work on July 8, 3 hours after his normal starting time. He "called in" about 6:30 a.m.; i.e., before his shift began. It then appears that he was testifying that he notified Respondent before his shift started that he would be late because he could not have a car to get to work on time. His supervisor, Cooke, asked him on July 8 who he spoke to when he called in early that morning and he responded that he did not get the name of that person. Eiche related that annual leave was routinely granted where an employee had "car trouble." The General Counsel placed in evidence bills for transmission repairs which disclose that Eiche's car had a defective transmission on July 6 and that a replacement transmission had been installed within the following 2 weeks.

Respondent denied Eiche's request for annual leave for those 3 hours and marked him AWOL. The leave slip contains a note by Cooke that Eiche did not name the person who took his call early on July 8.

Cooke testified for Respondent that there was no record that Eiche had called in on July 8. He also testified that he told Eiche on the preceding day that he could no longer be absent from work because of car trouble.

## 6. Eiche's 7-day suspension

On March 17, Eiche was given a written notice that he was to be suspended from April 6 to April 13. The stated reasons for that suspension were (a) Supervisor Meadows' version of an incident of March 9, and (b) Supervisor's Cooke's account that Eiche on March 10 had cursed him. The testimony as to the March 9 incident involving Eiche and Meadows has been discussed above; the conflicting versions as to the events on March 10 are set out below.

Eiche summarily denied making any such comments to Cooke. Cooke, in giving his testimony, read the suspension notice and then recounted the statements therein which recite that Eiche stated to him on March 10, "You're so fuckin smart you don't even know where the parts are, you fuckin jerk off." Cooke testified that Eiche made those remarks after Eiche and he had been unable to locate certain parts that Eiche wanted.

#### 7. Eiche's 10-day suspension

On March 25, Eiche was given a notice of suspension dated March 24 which stated that he was to be suspended from May 14 to May 24 because of an incident on March 19, as recounted by Cooke. The complaint alleges the March 19 incident was violative of the Act. Eiche testified as follows as to the events of March 19. Cooke, with another supervisor, Don Carnevale, present, directed him to remove his briefcase from the work area. Eiche was performing his regular work at that time. He informed Cooke that the briefcase contained a number of "Union" documents and asked if Cooke wanted him to bring it to his car. Cooke told him "to bring it off the working floor." Eiche declined to do so. Instead he told Cooke he would not bring it into the work area on the following day.

Cooke testified that, on March 19, Eiche twice refused his direct order to remove his briefcase from the work area. Cooke testified he gave his order as, both times, Eiche had the briefcase open, that he was looking in it and that he was not doing his work. On that basis, Eiche was suspended. Cooke conceded that Eiche had been bringing the briefcase to his work area every day since January.

Respondent called Supervisor Donald Carnevale to testify as to this incident. He stated that he was visiting in Cooke's area and observed that a briefcase was on the floor next to Eiche's work table. Eiche was doing his regular work then. According to Carnevale, Cooke instructed Eiche to remove the briefcase from the area. Carnevale heard Eiche reply that he would not do so. The notice of suspension issued Eiche by Cooke reads as follows, respecting the March 19 incident:

On March 19, 1981, at approximately 2:40 p.m. in the Penthouse Office area I called you over to the office and gave you a direct order, saying this was a direct order for you to remove your briefcase from the Penthouse work area floor. Your reply was, "No, is this a discussion." I then again said this is a direct order, remove your briefcase from the Penthouse work area floor. You again replied "No, I want it in writing." Once again I said this a direct order, remove your briefcase from the Penthouse work area floor. I received no reply as you walked back to your work bench and your briefcase was never removed.

## 8. The 5-minute rule and the related allegation

Respondent has a provision in its administrative manual that requires employees to be charged with leave time for every minute, beyond five, that they do not work in a normal 8-hour workday. It appears that that

rule was designed so that employees would still receive full pay if they punched in a minute late or punched out a minute early. If the total of those minutes exceeds five, the 5-minute rule is applicable, according to Respondent. The General Counsel alleges that it was discriminatorily applied to Eiche, that Respondent threatened to penalize Eiche's coworkers to force Eiche to withdraw a related grievance and that Respondent discriminatorily required Eiche to tender a payment of \$125 before it would honor his request for copies of time records he sought in connection with his grievance. Respondent asserts that the 5-minute rule was routinely applied to Eiche; it denies that it threatened any employees respecting his grievance; and it contends that it was required to inform Eiche of the costs involved in handling his requests for payroll data.

The relevant testimony is as follows. On March 24, according to Eiche, he punched out with other employees about 5 minutes before the normal lunchtime and, on the following day, he was the only one required to submit a leave slip for having punched out early. He submitted such a slip and he was charged with 5 minutes of annual leave. He filed a grievance thereon and asked Respondent to furnish him with relevant documents. He was advised that the cost of furnishing those documents would be about \$125. Eiche further testified that Cooke told him on April 1 that, if he continued to push the grievance, he, Cooke, would stop the practice of allowing employees to leave work 5 minutes early in order to avoid the usual traffic jam. According to Eiche, a number of his coworkers told him that they were upset that he was pursuing the grievance and he then withdrew it. Eiche also testified that, in his experience, no employee had to submit a leave slip when he was only 5 minutes short on his timecard. On cross-examination, Eiche stated that, while he did not know of any formal rules, he had heard of an informal policy under which employees could punch out several minutes early but would be charged with annual leave if they punched out early by 5 minutes or more. He stated that he requested the documentation to verify such a policy.

Cooke, in testifying, related that he was notified by the timekeeper that Eiche had punched out for lunch 5 minutes early on March 24, and that, in accordance with regular practice, he asked Eiche for, and received, a leave slip for 5 minutes to cover that incident. He testified also that Eiche did not file a grievance and that he, Cooke, never threatened any of the employees that their release time would be changed if Eiche pursued the matter.

Respondent also called its manager of accounting and reporting systems who described the procedures set out in the appropriate manual for furnishing information requested by bargaining representatives. She estimated the cost of retrieving and furnishing the data sought by Eiche to be \$113. Respecting the material Eiche received without charge in 1981, it appears that the costs therefor were nominal and were thus waived. Respondent also put in evidence records to establish that the Union had been charged moneys for copies of documents it request-

ed; those records indicate that the Union on those occasions had obtained a sizeable number of papers.

## 9. The alleged threat to arrest Eiche

On March 27, Eiche filed the charge in the instant case. He testified that, before he left work that day to go to the Board's Regional Office, Cooke told him that he felt that someone was rifling through his desk. Eiche further testified that, when he reported for work on the following Monday, Cooke told him that he was going to have Eiche arrested by the security guard. Eiche denied touching Cooke's desk.

Cooke testified that he asked all the employees under him "if anybody was going through [his] desk, and [all] said no." He testified that an important piece of paper was missing from his desk. Cooke denied threatening to report Eiche to Respondent's security service.

No one else testified on this point.

#### 10. Eiche's 14-day suspension

On July 8, Eiche was given a written notice that he was to be suspended from July 22 to August 5. The reasons given for that suspension, as stated in that notice, were that he was absent without authorization from his work area for a 22-minute period on July 7 and that, when Supervisor Cooke asked him why he was absent, he replied, in the presence of employees Smith and Hodges, "None of your fucking business, boy."

Eiche testified as follows as to the events on July 7. Cooke assigned him a job and told him to take only his screwdriver. In doing the job, it became evident that he also required the use of vise grip pliers. None of the employees in the vicinity had one available. He had to get one from his toolbox, about an 8-minute walk distant. On his return, he was asked by Cooke where he had gone and he told him that he had to get the pliers. Eiche denied cursing Cooke, as had been stated in the suspension notice.

When Cooke testified, he read the suspension notice. His account then tracked the substance of that report.

Respondent called employee Hodges to corroborate Cooke's account. He did so. He also testified that he heard Eiche on another occasion call Cooke a "yellow nigger"; there was no testimony to that effect from Cooke. Again, Hodges testified that Eiche called employee William Smith "a black fuck." Smith testified for Respondent, as noted below, but did not corroborate that statement by Hodges. Hodges also denied that he had discussed his testimony with anyone, including Respondent's counsel, prior to the hearing.

William Smith, who was named in the suspension notice, testified for Respondent. His account paralleled the report in the notice of suspension given Eiche. He also testified that, in March, Eiche had called Cooke in the work area a "yellow nigger." Smith also testified that Eiche used racial slurs in talking to other employees at Respondent's facility in Jersey City.

Eiche is white; Cooke, Meadows, Hodges, and Smith are black. The General Counsel called as a witness a shop steward who testified that he has known Eiche for 2 years and never heard him make a racist remark.

## 11. Alleged interference with Eiche's grievancehandling functions

The General Counsel contends that, beginning in March, Respondent discriminatorily began to prevent unit employees from using its paging system to talk to Eiche by telephone about a matter they wanted to grieve and that Respondent has continued to so discriminate. Respondent's position is that there is an established procedure set up by Respondent and the Union for releasing stewards for grievance matters and that that procedure was routinely followed with Eiche and all other stewards.

Eiche testified that "normally" any employee at Respondent's facility can dial the paging extension to ask that another individual be paged and that that person is then paged. He further testified that, in March and since, he was told by other employees that they were not allowed to page him, Eiche, and that they had to, in effect, follow the contract procedure to have Eiche released.

The General Counsel called as a witness Thomas Mingoia, an employee at Respondent's Jersey City facility. He testified that, on March 26, he requested that Eiche be paged and was told that this could not be done without the permission of Eiche's supervisor. Mingoia further testified that, on April 28, he had shop steward Neil Graham paged three times without having any of his requests cleared by Graham's supervisor. One of Respondent's supervisors testified, during his cross-examination, that employees at the Jersey City facility occasionally have paged other employees directly and without having to obtain clearance from management.

Cooke testified that he knew of no special paging rules applicable to only Eiche and acknowledged that employees have paged one another at the Jersey City facility.

## 12. Eiche's periodic wage increase

Eiche's periodic wage increase was delayed several months. The General Counsel attributes that delay to the discriminatory discipline given him; Respondent contends that the delay was an appropriate remedial measure.

## 13. Incident report by Meadows

The complaint alleges that on March 12 Respondent, by Supervisor Joseph Meadows, discriminatorily issued an incident report on March 12 to Eiche. That report is the one which was discussed earlier under the subsection about the grievance Eiche handled with Meadows on March 9.

## C. Credibility Resolutions

Critical to a determination of many of the issues in this case is whether Eiche's accounts thereon are or are not credited as against the conflicting testimony by Cooke. This is obvious from their respective versions on the first issue—whether Cooke told Eiche he was going to fire Eiche all by himself because Eiche helped Hodges file an unfair labor practice charge involving Cooke. The credibility issues pertain to whether or not Eiche made racist

comments to supervisory personnel and was insubordinate.

One relevant consideration bearing on credibility is that Eiche had not been disciplined in 7-1/2 years of service with Respondent and then was repeatedly disciplined after he followed through with his warning to Respondent that he would present evidence, bearing on Hodges' grievances, to the Board's Regional Office. I note too that Eiche was issued his first disciplinary warning by Cooke on February 5 and that a complaint had issued on January 21, in Case 22-CA-10489 (P) which alleged that Respondent had refused since October 22, 1980, to permit Hodges to see Eiche about grievances. That complaint named Cooke, the supervisor of Eiche and Hodges, as an agent of Respondent. Yet, it is possible that Eiche may have gotten carried away with the fact that he became shop steward in September 1980, and was instrumental in having that complaint issue, by reason of the cooperation he gave to the Board's Regional Office in that case. That seems unlikely, however. Essentially, Respondent asserts that Eiche repeatedly resorted to crude racist remarks which would indicate a great hostility on his part towards black people. I find it difficult to reconcile that contention with the fact that he assisted Hodges, who is a black, by presenting his grievances aggressively. Yet again, Hodges himself has testified for Respondent against Eiche, as did another black employee, Smith. It may well be that Hodges had reconciled any differences he had with Cooke as I note that he has not been disciplined since he filed the charge in the prior case but, earlier in 1980, he had been the recipient of a number of disciplinary actions.

In any event, I am not persuaded of the objectivity of the accounts of Hodges and Smith. Hodges failed to impress me with his statement at the hearing that he had never discussed his testimony with anyone prior to the hearing. More significantly, he and Smith both testified that Eiche told Cooke that he, Cooke, was a "yellow nigger" when they were on the work floor. Yet, Cooke never alluded to any such incident and it is most unlikely that Cooke would have overlooked such a remark.

I was impressed with the testimony of a union steward who related that Eiche never used racial remarks and that he does not even curse well. The fact that Eiche was entrusted with a steward's position lends credence to that testimony.

Another objective factor is that, on a significant point, the testimony of one of Respondent's supervisors directly corroborates Eiche's version and controverts Cooke's. Thus, Cooke testified that twice on March 19 he found Eiche looking into his briefcase and disciplined him for refusing to heed his orders to stop doing so and for refusing to remove his briefcase. Eiche testified that he was working and not looking in his briefcase when subjected to discipline that day. Respondent called its supervisor, Carnivale, to testify as to that incident. His testimony was that Eiche was working and that his briefcase was closed and was laying on the floor alongside his work table.

A further objective factor is the format of Cooke's memorandum book. His testimony was to the effect that he made regular business entries in it. The entries were not regularly made and, for 1981, were overwhelmingly concerned with Eiche's performance.

Additionally, I note that on the matter of the discontinuance of overtime work, Cooke's explanation of why overtime was discontinued is not persuasive. After having made overtime assignments, he testified that he advised the superintendent of maintenance that his crew was "far ahead" in their work and that the superintendent then told him that overtime was not needed. It seems illogical that Cooke would have assigned overtime to his crew in the first place if it was so far ahead in its work. Last, I note that two employees testified convincingly that, when they asked Cooke why overtime was canceled then, he told them in essence that they had Eiche to thank for it.

There is still the testimony of Meadows to consider. I am not persuaded that his account is accurate. For such a crude racist remark to have been made as the one he attributed to Eiche, he took it too calmly if he is to be believed. Second, there was a lapse of over a week before Eiche was notified that Respondent considered such a remark as a matter of serious consequence. Third, the evidence indicates that Eiche had Meadows in a difficult situation as he was grieving Meadows' having cracked down on one employee for having punched out to lunch early and was pressing Meadows to justify that, in light of Meadows' having let his whole crew punch out early for lunch on another occasion. I was not impressed when Meadows testified that he was not upset over that matter.

I note also that the evidence on a point collateral to the racist issue suggests that Cooke's actions were, as the General Counsel contends, discriminatorily motivated. Cooke denied Eiche's request for annual leave on March 18, on the ground that he had not furnished substantiation. When Eiche later offered independent documentation thereon, Cooke rejected it as "too late." No explanation of that reason was offered despite the evidence offered by the General Counsel of clear disparate treatment thereon. Another employee was allowed to offer late documentation to have his leave request approved.

Last, Cooke's testimony on material points was developed through leading questions.

I credit Eiche's account.

# D. Analysis

The credited testimony of Eiche discloses that Cooke and Meadows directly threatened him and others, that the reasons offered for having disciplined Eiche were clearly pretextual and designed to conceal its discriminatory motives and that Eiche was accorded disparate treatment as to his requests for leave since his confrontation with Cooke began with the processing of Hodges' unfair labor practice case. I thus find that Respondent, by Cooke:

(a) Threatened Eiche on two occasions with discharge to discourage him from participating in the investigation of an unfair labor practice charge by the Board's Regional Office and from performing his duties as a union steward.

- (b) Threatened to eliminate overtime assignments to discourage employees from filing grievances.
- (c) Threatened Eiche with arrest to discourage him from cooperating in the investigation of an unfair labor practice charge and from supporting the Union.
- (d) Issued Eiche a written warning on February 5; suspended him three times; denied his leave requests for March 11, 12, 13, and 18 and July 8; and deferred his periodic wage increase because he cooperated in the unfair labor practice charge investigation and supported the Union
- (e) Discontinued overtime assignments to discourage employees from filing grievances.

I further find that Respondent, by Meadows, threatened Eiche with physical harm to discourage Eiche from processing a grievance and filed an incident report on March 12 against Eiche because Eiche cooperated in a Board investigation and because of his union activities.

I do not find that Respondent's 5-minute rule was unlawfully applied to Eiche. While he did punch out with the other employees and they apparently were not required to submit leave slips, the evidence fails to establish that the timecards of the other employees were, like Eiche's, in violation of the 5-minute rule. At least, the testimony offered by the General Counsel was countered by that offered by Respondent; the General Counsel could but did not obtain or submit the timecards themselves to establish any disparate treatment of Eiche. The evidence is also insufficient to establish that Respondent discriminatorily denied employees access to Eiche via its paging system; one instance does not prove an alleged discriminatory policy. I also find that the evidence is insufficient to establish that Respondent unlawfully notified Eiche that it would cost him \$125 to honor his request for grievance data as that figure in fact approximated the authorized costs and as there is no evidence of disparate treatment thereon.

## CONCLUSIONS OF LAW

- 1. The Board has jurisdiction over Respondent pursuant to the provisions of the Postal Reorganization Act.
- 2. The Union is a labor organization as defined in Section 2(5) of the Act.
- 3. Respondent, in violation of Section 8(a)(1) of the Act, interfered with, restrained, and coerced its employees with respect to the rights guaranteed them under Section 7 of the Act by the threats, warnings, disciplinary reports, and notices issued by Cooke and Meadows as found above and by the conduct specified below in paragraphs 4 and 5.
- 4. Respondent, in violation of Section 8(a)(3) of the Act, discouraged its employees from supporting the Union by having, through Cooke and Meadows, issued a written warning to Eiche on February 5, discontinued overtime assignments as of March 6, issued disciplinary warnings, notices, incident reports, and suspensions to Eiche, denied him leave requests for March 11, 12, 13, and 18 and July 8, and deferred Eiche's periodic wage increase.
- 5. Respondent, in violation of Section 8(a)(4) of the Act, discriminated against Eiche because he cooperated with the investigation of an unfair labor practice charge,

by the Board's Regional Office by having issued a warning to Eiche on February 5, by having an incident report filed on him by Meadows on March 12, by suspending him three times, by denying his leave requests as aforesaid, by threatening his arrest, and by deferring his periodic wage increase.<sup>4</sup>

6. Respondent did not violate the Act as alleged in paragraphs 19, 22, 23, and 24 of the amended complaint or threaten arrest in violation of Section 8(a)(3) as alleged in paragraph 21 of the amended complaint.<sup>5</sup>

## REMEDY

Having found that Respondent engaged in certain unfair labor practices, I recommend that it be required to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. To remedy its discriminatory conduct toward Eiche, as found above, Respondent shall be required to make him whole for all lost earnings suffered by reason of that conduct with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977), and shall restore his leave time for March 11, 12, 13, and 18 and July 8. Further, all employees who were unlawfully denied overtime assignments on and since March 6 by Cooke's order shall be made whole therefor in the same manner as set forth above for Eiche.

Respondent will also be required to expunge all references to the warnings, notices, reports, and suspensions issued to Eiche and to any reference to such discipline in any other document, including those on which he was denied a timely periodic wage increment.<sup>6</sup>

The facts of this case do not warrant a broad remedial order.7

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

# ORDER8

The Respondent, United States Postal Service, Jersey City, New Jersey, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Threatening employees with discharge or arrest to discourage them from cooperating in investigations conducted by the National Labor Relations Board or from supporting the North Jersey Area Local, American Postal Workers Union, AFL-CIO (herein the Union).

<sup>1</sup> The threat of discharge set out in par. 7 of the amended complaint was not alleged as a separate violation of Sec. 8(a)(4).

<sup>&</sup>lt;sup>5</sup> Pars. 17 and 18 were withdrawn at the hearing. Paragraph 23 alleges in substance an evidentiary fact which relates to the unlawful 10-day suspension of Eiche.

<sup>&</sup>lt;sup>6</sup> Sterling Sugars, Inc., 261 NLRB 472 (1982).

<sup>1</sup> Ibid.

<sup>&</sup>lt;sup>8</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

- (b) Threatening employees with loss of overtime work assignments to discourage the filing or processing of union grievances.
- (c) Threatening employees with physical harm to discourage the processing of union grievances.
- (d) Issuing warnings, incident reports, suspension notices, or other disciplinary documents to discourage employees from supporting the Union or to discourage them from cooperating in a Board investigation of unfair labor practice charges.
- (e) Suspending employees, denying leave requests, or deferring periodic wage increases to discourage employees from cooperating in Board investigations or to discourage their support for the Union.
- (f) Discontinuing overtime work assignments to discourage employees from filing union grievances.
- (g) In any like or related manner interfering with, restraining, or coercing employees as to their rights under Section 7 of the Act.
- 2. Take the following affirmative action to effectuate the policies of the Act:
- (a) Make Joseph Eiche whole, by paying him, with interest accrued, for all wages lost by him as a result of his having been discriminatorily suspended three times in 1981, by his having been discriminatorily denied leave on four dates that year and by having his periodic wage increment withheld.
- (b) Make all employees, including Eiche, who were discriminatorily denied overtime assignments on and since March 7, 1981, whole for all wages lost thereby with interest thereon.
- (c) Revoke and expunge from its records all reference to discipline issued to Joseph Eiche in 1981 and notify him in writing that this has been done and that evidence of such unlawful discipline will not be used as a basis for personnel actions against him.
- (d) Post at its International Mail Bulk Center in Jersey City, New Jersey, copies of the attached notice, marked "Appendix." Copies of that notice, on forms provided by Region 22, after being signed by Respondent's authorized representative, shall be posted by it immediately upon recieving them and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that those notices are not altered, defaced, or covered by any material.
- (e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, personnel records, and other documents needed to calculate the amount of backpay due under the terms of this order and to ensure that all references to unlawful discipline have been expunged.
- (f) Notify the Regional Director for Region 22, in writing, within 20 days of the date of this Order, what steps Respondent has taken to comply with it.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as the matters set out in paragraph 6 of the Conclusions of Law section herein are concerned.

#### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten employees with discharge or arrest to discourage them from cooperating in investigations conducted by the National Labor Relations Board or from supporting the North Jersey Area Local, American Postal Workers Union, AFL-CIO.

WE WILL NOT threaten employees with loss of overtime work assignments to discourage the filing or processing of union grievances.

WE WILL NOT threaten employees with physical harm to discourage the processing of union grievances.

WE WILL NOT issue warnings, incident reports, suspension notices, or other disciplinary documents to discourage employees from supporting the Union or to discourage them from cooperating in a Board investigation of unfair labor practice charges.

WE WILL NOT suspend employees, deny leave requests, or defer periodic wage increases to discourage them from cooperating in Board investigations or to discourage their support for the Union.

WE WILL NOT discontinue overtime work assignments to discourage employees from filing union grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees as to their rights under Section 7 of the Act.

WE WILL make Joseph Eiche whole, by paying him, with interest accrued, for all wages lost by him as a result of his having been discriminatorily suspended three times in 1981, of his having been discriminatorily denied leave on four dates that year, and of his periodic wage increment being withheld.

WE WILL make all employees, including Eiche, who were discriminatorily denied overtime assignments on and since March 7, 1981, whole for all wages lost thereby with interest thereon.

WE WILL revoke and expunge from our records all references to discipline issued to Joseph Eiche in 1981, and WE WILL notify him in writing that this has been done and that evidence of such unlawful discipline will not be used as a basis for personnel actions against him.

UNITED STATES POSTAL SERVICE

<sup>&</sup>lt;sup>9</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."